No. 16-1027

In the Supreme Court of the United States

RYAN AUSTIN COLLINS, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private

[1] All parties have consented to the filing of this amicus curiae. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL has an interest in ensuring the fair and just development of constitutional principles that affect the proper, efficient, and just administration of criminal justice. To this end, NACDL files numerous amicus curiae briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present legal and constitutional questions of particular significance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of critical importance to NACDL and the clients its attorneys represent. At stake is the right of persons to be free from warrantless searches of their homes absent a factual showing of actual exigent circumstances.

SUMMARY OF THE ARGUMENT

This is an easy case. The heart of this case is not the police's warrantless search of a motorcycle. It is the police's preceding, warrantless invasion of petitioner's home. That invasion itself constituted a "search" under the Fourth Amendment. See *United States* v. *Jones*, 565 U.S. 400, 406 n.3 (2012) ("Where * * * the Government obtains information by physically intruding on a constitutionally protected area, [a Fourth Amendment] search has undoubtedly occurred."). Because that invasion did not comply with the Fourth Amendment, and because the officers "expoit[ed]" the illegal invasion by then immediately conducting a

search of what lay underneath an opaque motorcycle cover concealing from plain view the evidence that the police hoped to find, the evidence the police discovered from that secondary search is inadmissible fruit of a poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (quoting John MacArthur Maguire, *Evidence of Guilt* 221 (1959)).

The relevant facts are not in dispute. A police officer wanted to know whether what lay underneath an opaque motorcycle cover was not just any motorcycle, but rather a motorcycle that he believed was evidence in a criminal investigation. The covered motorcycle, however, was not on a public roadway, but rather was on a private parking patio abutting the side of petitioner's home—an area that this Court's case law deems "curtilage" and "part of the home itself for Fourth Amendment purposes." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013) (quoting *Oliver* v. *United States*, 466 U.S. 170, 180 (1984)). Lacking a warrant, petitioner's consent, or any plausible exigent circumstances, the police chose to invade the curtilage anyway—walking up the driveway, past the home's front steps, and on to the parking patio—so that they could remove the motorcycle cover and see whether it had been concealing what the police had been looking for. This Court's precedents make clear that this warrantless invasion of petitioner's home violated the Fourth Amendment, and the fruits of that violation are subject to the exclusionary rule.

In nevertheless allowing the admission of the evidentiary fruits of the police's illegal invasion of petitioner's home, the Supreme Court of Virginia effectively endorsed the following principle: the police's war-

rantless invasion of a person's home will be excused so long as the purpose of the invasion was to search an automobile parked on the property. That principle cannot be reconciled with this Court's precedents. The decision below should be reversed.

ARGUMENT

I. THE POLICE'S WARRANTLESS INTRUSION INTO A HOME OR ITS CURTILAGE IS PRESUMPTIVELY UNCONSTITUTIONAL

"[W]hen it comes to the Fourth Amendment, the home is first among equals," and the "curtilage of the house * * * enjoys protection as part of the home itself." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). The sanctity of that domestic space is the "very core" of the Fourth Amendment. *Ibid.* (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)); see *United States* v. *U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). Accordingly, with respect to that space, the exceptions to the warrant requirement are at their most narrow: any intrusion "without a warrant [is] presumptively unreasonable absent exigent circumstances." *United States* v. *Karo*, 468 U.S. 705, 715 (1984); see *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

The Fourth Amendment's special concern with, and protection of, the home is rooted in the English common law principle that "the property of every man [is] so sacred" that if a man "will tread upon his neigh-

bour's ground, he must justify it by law." *United States* v. *Jones*, 565 U.S. 400, 405 (2012) (quoting *Entick* v. *Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)). This Court has called this principle "'the true and ultimate expression of constitutional law' with regard to search and seizure." *Ibid.* (quoting *Brower* v. *Cty. of Inyo*, 489 U.S. 593, 596 (1989)); see *Boyd* v. *United States*, 116 U.S. 616, 626 (1886). Not surprisingly, then, the common law's heightened protection of the home against trespass was carried over into the very text of the Fourth Amendment, which specifically enumerates the "house[]" as a place that shall be free from "unreasonable searches and seizures." U.S. Const. Amend. IV.

Consistent with this "traditional property-based understanding of the Fourth Amendment," *Jardines*, 569 U.S. at 11, this Court's Fourth Amendment jurisprudence virtually always has "embod[ied] a particular concern" for protecting the home against "government trespass." *Jones*, 565 U.S. at 406; see also *Jardines*, 569 U.S. at 13 (Kagan, J., concurring) (describing the home as "the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects"). Although "property rights are not the sole measure of Fourth Amendment violations," *Jardines*, 569 U.S. at 11—and a violation may occur even when the investigation does not take place in a constitutionally protected area—the Fourth Amendment's "property-rights baseline * * * keeps easy cases easy" where there *has* been a physical intrusion onto protected property, *ibid.* Because of the Fourth Amendment's basis in common law property rights and particular concern for the home, a "presumption of unreasonableness * * * attaches to" warrantless intrusions on a per-

son's home. *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984). This same presumption applies to warrantless searches of the curtilage, "the land immediately surrounding and associated with the home." *Oliver* v. *United States*, 466 U.S. 170, 180 (1984).[2] The curtilage is "'intimately linked to the home, both physically and psychologically,' and is [therefore also] where 'privacy expectations are most heightened.'" *Jardines*, 569 U.S. at 7 (quoting *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986)). Accordingly, the curtilage "has been considered part of the home itself for Fourth Amendment purposes," *Oliver*, 466 U.S. at 180, and receives the same robust Fourth Amendment protections as the home's interior.

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[2] "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). At common law, "curtilage" was generally "defined by an American court to mean, 'a space necessary and convenient, and habitually used for the family purposes, the carrying on of domestic employments; it includes the garden, if there be one, and need not be separated from other lands by a fence.'" Joell Prentiss Bishop, *Commentaries on the Criminal Law* 217 (1858) (quoting *State* v. *Shaw*, 31 Me. 523, 523 (1850)). The curtilage therefore includes "the yard, or garden, or field, which is near to, and used in connection with, the dwelling." *Cook* v. *State*, 3 So. 849, 850 (Ala. 1888) (quoting *Ivey* v. *State*, 61 Ala. 58 (1878)). The parking patio here fits comfortably within this definition. Such outdoor spaces are used not merely to store one's automobile, but also for play, for social gatherings, and as a place to store other effects.

II. A Showing Of Exigent Circumstances Is Required To Justify A Warrantless Intrusion On A Person's Home Or Its Curtilage

If police officers lack a warrant or consent, then they need "exigent circumstances" to justify their "intrusion into the curtilage" of a person's home. *United States* v. *Carloss*, 818 F.3d 988, 1003 (10th Cir.) (Gorsuch, J., dissenting), cert. denied, 137 S. Ct. 231 (2016).[3] This Court has made clear that "exigent circumstances" is not an empty phrase that the police may invoke whenever they might find it inconvenient to obtain a warrant or consent to a search. Rather, "'the exigencies of the situation' [must] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald* v. *United States*, 335 U.S. 451, 456 (1948)).

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[3] There can be no serious contention here that petitioner consented to the police's intrusion of the parking patio to rummage underneath the motorcycle cover. The record makes clear that the portion of the parking patio on which the covered motorcycle was located was beyond the point where an impliedly invited visitor, such as a Girl Scout, would walk to access the front door. Moreover, after intruding on that portion of the parking patio, the police did not merely glance around. Rather, they took the subsequent step of lifting the cover off the motorcycle so that they could see things that were not in plain view. See *Florida* v. *Jardines*, 569 U.S. 1, 9 (2013) ("The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."). In short, it is clear that the officers did more "than any private citizen might" with respect to petitioner's home and its curtilage, and therefore exceeded the scope of any implied license. *Id.* at 8 (quoting *Kentucky* v. *King*, 563 U.S. 452, 469 (2011)).

"[T]he burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984).

The circumstances that this Court has described as sufficiently exigent to justify a warrantless intrusion of the home demonstrate how narrow the exception is. The Court has held, for example, that officers may enter the home without a warrant to "fight a fire and investigate its cause, to prevent the imminent destruction of evidence, to engage in 'hot pursuit' of a fleeing suspect, * * * [and] to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (internal citations omitted) (quoting *United States* v. *Santana*, 427 U.S. 38, 42, 43 (1976)). In simple terms, unless they have a warrant or consent, the police cannot "enter the curtilage to conduct an investigation * * * absent an emergency." *Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting).

III. An Automobile's Inherent Mobility, In And Of Itself, Is Not A *Per Se* Exigent Circumstance Justifying A Warrantless Intrusion On The Home Or Its Curtilage

The Supreme Court of Virginia held that it did not need to "independently assess whether exigent circumstances existed here," because in its view "the automobile exception is a distinct and independent exception to the warrant requirement" that justified the police's actions here, including the police's warrantless invasion of the curtilage of petitioner's home in order to access

the covered vehicle. Pet. App. 13-14. That holding runs contrary to this Court's precedent.

In *South Dakota* v. *Opperman*, the Court drew a "distinction between automobiles and homes or offices in relation to the Fourth Amendment." 428 U.S. 364, 367 (1976). The Court stated the "reason for this well-settled distinction is twofold." *Ibid.* "First, the inherent mobility of automobiles" presents an "exigency." *Ibid.* (citing *Carroll* v. *United States*, 267 U.S. 132, 153-154 (1925)). Second, "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that related to one's home or office." *Ibid.* The Court in *Opperman* made clear that this second rationale—that a person simply expects less privacy with respect to an automobile than with respect to the home—is an essential piece of the automobile exception's constitutional foundation. See *ibid.* (recognizing that the automobile exception may apply even "where no immediate danger was presented that the car would be removed from the jurisdiction").

Put another way, the Court's automobile exception cases at least implicitly recognize that whatever "exigency" a parked (or, in this case, parked and covered) automobile's inherent mobility presents, it is not the type of "emergency" that by itself justifies a warrantless search *per se*. Cf. *Kentucky* v. *King*, 563 U.S. 452, 470 (2011) ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency."); cf. also David E. Steinberg, *The Drive toward Warrantless Auto Searches: Suggestions from a Back Seat Driver*, 80 B.U. L. Rev. 545, 570 (2000). Instead, the automobile exception springs from the *com-*

bination of that lesser form of exigency with the owner's reduced expectation of privacy. Where, as here, the circumstances did not present a true, *bona fide* "emergency," the question thus becomes whether the police's search implicated only a diminished expectation of privacy. The Court has explained that a person has a diminished expectation of privacy in a vehicle that is stationed on a public roadway or "in a place not regularly used for residential purposes." *California* v. *Carney*, 471 U.S. 386, 392 (1985). The Court has never held, nor even suggested, that a person also has such a diminished expectation of privacy in an automobile parked within the curtilage of the home that the police would be entitled to invade the curtilage without a warrant in order to gain access to the automobile. To the contrary, privacy interests are at their zenith where the home, including its curtilage, is concerned. See pp. 4-6, *supra*.

The decision below depended on at least one of the following two analytical errors with respect to the automobile exception: First, the Supreme Court of Virginia may have mistakenly believed that the inherent mobility of a vehicle (even one being stored underneath a cover) presents the type of emergency that constitutes "exigent circumstances," and is thus sufficient by itself to justify the officers' warrantless intrusion of the curtilage of petitioner's home.[4] Second, the Supreme

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[4] The Supreme Court of Virginia suggested that this was in fact not its rationale. See Pet App. 13-14 ("[W]e do not find it necessary to independently assess whether exigent circumstances existed here. Rather, the facts of this case are more properly addressed by a different exception to the warrant requirement: the automobile exception."); Pet. App. 18 (declining to consider

Court of Virginia may simply have ignored that the officers' access to the covered motorcycle was entirely predicated on their immediately preceding trespass on the curtilage of petitioner's home. Neither rationale withstands scrutiny. If the automobile exception were allowed to take priority over the Fourth Amendment protections that the home enjoys—which is to say, if the Fourth Amendment allowed a police officer to trespass on a person's home or its curtilage in order to effectuate a search of an automobile—logically it would not matter whether the automobile was parked on an uncovered parking patio (as here), in a covered carport, in a fully-fenced area, an enclosed garage detached from the home, or even an enclosed garage attached to the home.[5] The notion, however, that police officers are permitted to break into even an enclosed garage attached to the home—a space that most homeowners likely would consider a literal part of the home's interior—in order to effectuate a search of an automobile parked therein offends fundamental Fourth Amendment principles.

"whether the motorcycle was immediately mobile at the precise moment of the search" because the automobile exception's "bright-line test does not require us to hypothesize whether it would have been technically possible for Collins to uncover the motorcycle, start the engine, and flee from Officer Rhodes").

[5] Indeed, one might ask if the Supreme Court of Virginia's logic would extend to a motorcycle stored in petitioner's living room. Drawing a distinction between that case and the present one would require drawing a distinction between the Fourth Amendment protection afforded the home and curtilage that this Court has never endorsed.

Equally contrary to the Fourth Amendment would be a rule permitting some but not other trespasses predicate to an automobile search, *e.g.*, a rule that would permit a trespass on a home's side parking patio but not of a home's attached, enclosed garage. For Fourth Amendment purposes, people enjoy the same protections from physical intrusions onto the curtilage—which "enjoys protection as part of the home itself," *Jardines*, 569 U.S. at 6—whether their curtilage is comprised of a small parking patio or a large garage. As the Court has put it, "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States* v. *Ross*, 456 U.S. 798, 822 (1982). Discriminating between invasions on the curtilage would almost certainly result in wealthy persons enjoying more robust Fourth Amendment protections than those of more modest means. Indeed such a rule would have a disproportionate impact on clients of NACDL's members. NACDL's members provide criminal defense services for many indigent clients who do not have enclosed garages due to a variety of economic and socioeconomic factors.

This Court has made clear that the Fourth Amendment protections do not depend on someone's means or socioeconomic status. Cf. *Ross*, 456 U.S. at 822 (explaining that a "traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim[s] an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case"). Any rule that tried to make such distinctions like those between a parking patio, carport, or an enclosed garage would un-

doubtedly run counter to this Court's longstanding principles. "We have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's house is his castle to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown.'" *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006) (alteration omitted) (quoting *Miller* v. *United States*, 357 U.S. 301, 307 (1958))).

* * * * *

As noted above, this is an easy case. Without a warrant or petitioner's consent (express or implied), the police trespassed on the curtilage of petitioner's home in order to look underneath a motorcycle cover that was covering some type of motorcycle. For Fourth Amendment purposes, this is indistinguishable from the facts in *Florida* v. *Jardines*, where the officer was able to "gather[] * * * information" only by first "physically entering and occupying" the curtilage of the home without being "explicitly or implicitly permitted by the homeowner." 569 U.S. 1, 5-6 (2013). As *Jardines* holds, this is precisely what the Fourth Amendment prohibits.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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